BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

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APPLICATION OF CATALINA CHANNEL EXPRESS (VCC-52) FOR REHEARING OF RESOLUTION M-4865

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Pursuant to Sections 1731 to 1736 of the Public Utilities Code[1] and Rules 16.1 to 16.6 of the California Public Utilities Commission ("Commission") Rules of Practice and Procedure ("Rules"), Catalina Chanel Express, Inc. ("CCE") hereby applies for rehearing of Resolution M-4865 ("Res. M-4865" or "Resolution"). Pursuant to Rules 14.2(d)(4) and 16.2(b), CCE is a "party" eligible to seek rehearing.

Res. M-4865 was mailed to the affected parties on December 16, 2022.[2] In accordance with Section 1731(b) and Rule 16.1(a) of the Commission's Rules of Practice and Procedure, the last day to seek rehearing of it is January 16, 2023. This pleading is timely filed.[3]

[1] All statutory references herein are to the California Public Utilities Code unless otherwise indicated.

[2] The Commission's Rules do not provide for service of an application for rehearing of an "M" resolution. Accordingly, this application for rehearing is being served on the Commission's General Counsel and Executive Director, the personnel in the Commission's Administrative Service Division to whom comments on Draft Resolution M=4865 were directed and other entities that submitted comments on Draft. Res, M-4865.

[3] *See* Commission Rules of Practice and Procedure, Rule 16.1, subd. (a) ("Application for rehearing of a Commission order or decision shall be filed within 30 days after the date the Commission mails the order or decision.").

I. BACKGROUND AND SUMMARY OF ARGUMENT

A. The City of Avalon Wharfage Fee

The City of Avalon operates and maintains a harborside landing facility ("Wharf") at the harbor at Avalon on Santa Catalina Island ("Island") . While the cost of operating and maintaining the Wharf is borne by the taxpayers of Avalon, most of the individuals actually using the Wharf are visitors to the Island that arrive and depart by water. Over fifty years ago, the City Council of Avalon, seeking to more equitably spread the burden of operating the Wharf, passed an ordinance imposing a fee on passengers that embark or disembark from commercial vessels at the Wharf ("City Fee").

While the City could have installed ticket booths and turnstiles at the Wharf to collect the City Fee from passengers, that means of collection would have greatly delayed the embarkation and disembarkation process. The largest passenger ferries serving the Island carry over 400 passengers. Accordingly, the City ordinance requires the commercial carriers carrying the passengers to collect the City Fee from those passengers and expeditiously remit the sums collected to the City. This means of collection has worked well for the City, the carriers and the public, without incident or controversy, for over fifty years.

B. Removal of City Fee From Vessel Carrier Tariffs

Initially, many, if not most, Commission regulated vessel carriers ("VCC"s) included the City Fee in their tariffed fare charged to their passengers. This practice proved impractical, however, because the City Fee could change without any action by the VCC or the Commission. Accordingly, in 1980, one VCC serving Avalon sought Commission authority to simply remove the City Fee as a component of any fare in its tariff. As described by the Commission:

> In order not to have to apply to have its tariff amended every time the City of Avalon changes its landing fee or, alternatively, to have to absorb the

changes in its revenue, H. Tourist proposes to separate the fee from the fare listed in its tariff and to collect it exclusively of its tariff listing.[4]

The Commission agreed, concluding that "(t)he exclusion of landing fees from H. Tourist's tariff for Avalon is justified and its tariff should be revised accordingly."[5]

Other carriers followed suit. Today, vessel carriers, whether regulated by the Commission or not, simply collect the City Fee from passengers and pay it to the City. For example, on its most frequently travel route, CCE, collects a $7 City Fee from each round-trip adult passenger and pays the $7 to the City. The City Fee is separately identified on printed tickets and on CCE's website. This system of collecting the City Fee from passengers on an un-tariffed basis and remitting the City Fee to the City has operated without incident or controversy for over forty years. Moreover, the California Supreme Court has affirmed that sums received by a utility as a collection agent for a government body are not to be viewed as a "charge by the utility". The Court stated that:

> "(c)harges demanded or received by [a] public utility" … is not naturally understood to encompass charges the public utility demands or receives when acting merely as a billing service for a public agency."[6]

The Court stated that references to "charges demanded or received by [a] public utility" in the Public Utilities Code were references to products or services actually provided by that utility, not charges rendered as a billing agent.[7]

C. New Staff Position On City Fee

In 2021, the Commission's Transportation Enforcement Branch ("Staff"), contrary to forty years[8] of precedent and practice, began asserting that the reach of the Public Utilities Commission Transportation Reimbursement Account User Fee ("PUCTRA

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[4] *H. Tourist, Inc.*4 CPUC 2d 424, 1980 WL 129080 *1

[5] *Id* at Conclusion of Law No. 1 at *3.

[6] *Monterey Peninsula Water Management District v. Public Utilities Commission* (2016), 62 Cal. 4th 693, 699.

[7] *Id*.

[8] See discussion at page 6 *infra* of *H. Tourist, Inc.*4 CPUC 2d 424, 1980 WL 129080 (Cal.P.U.C.)

Fee") extended beyond revenues paid to a VCC for regulated services provided by the VCC. The Staff's newly announced view was that sums collected by a VCC that bore no connection at all to the Commission or its "regulatory activities" must, nonetheless, be subject to a PUCTRA Fee. The Staff adheres to that view even though the a fee, by statute, is designed to reimburse the Commission for the cost of "the commission's regulatory activities for the class [vessels] from which the fee is collected…"[9] Indeed, The Staff adheres to that view even though the sums collected are for a service provided by the City rather than the VCCs serving the City.

CCE apprised the Staff of CCE's disagreement with the Staff view, stating that it was contrary to (1) statutory construction informed by jurisdictional limitations, (2) decades of Commission administration of the PUCTRA Fee and (3) the simple fact that the revenue derived from the City Fee belongs to the City and not CCE.

D. Resolution M-4858

In December of 2021, the Commission issued Res. M-4858, which set the PUCTRA fees for 2022. Because CCE's dispute with the Staff remained unresolved, CCE filed comments on Draft Res. M-4858 explaining why subjecting wharfage fees imposed by the City to PUCTRA was unlawful and contrary to forty years of Commission precedent.[10] In response, the Commission stated that "(t)he particular application of Public Utilities Code Section 424(b)[11] to CCE's wharfage fees and sightseeing tours is beyond the scope of this resolution."[12]

E. Resolution M-4865

On December 16, 2022, the Commission issued Res. M-4865 setting PUCTRA Fee rates for 2023. Unlike Res. M-4858 or any other past PUCTRA resolution, Res. M-4865 subjected "fees such as bridge tolls, wharfage fees, and similar charges collected

[9] Section 422(a)(2).

[10] *H. Tourist, Inc.*4 CPUC 2d 424, 1980 WL 129080 (Cal.P.U.C.)

[11] *Id*.

[12] Res. M-4858, p. 8.

from passengers" to the PUCTRA charge[13]. It did so premised on a theory that such taxes and fees are "incidental to the delivery of transported persons."[14] Res. M-4865 ignored the fact that no Commission "regulatory activit[y]"[15] funded by PUCTRA fees is (or could lawfully be) involved in the review, setting, modification or collection of government taxes or fees. It ignored the absence of any linkage to the purposes of Chapter 2.5[16], simply stating that "(f)or tariffed common carriers, per Public Utilities Code § 494,[17] 'compensation for transportation' includes not only 'fares' approved in their tariffs, but also other 'rates' and 'charges'. It chose to focus on the collector of the sums at issue ("a billing service for a public agency") rather than the government entity ("public agency") the generated the tax or fee and to which the sums belonged. That analytical omission is directly at odds with the California Supreme Court's observation in 2016 that:

> "(c)harges demanded or received by [a] public utility" … is not naturally understood to encompass charges the public utility demands or receives when acting merely as a billing service for a public agency."[18]

Res. M-4865 cast the new policy as a "clarification."[19] A departure from forty years of practice, however, if of far greater import than such a term would suggest. In Res. M-4865, the Commission has apparently concluded that taxes and fees that are (1)

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[13]Res. M-4865, p. 7.

[14] Res. M-4865 cites this phrase from Section 208 which defines the services embraced with the term "Transportation of persons".

[15] Section 422(a)(2).

[16] Sections 401-444.

[17] As CCE notes at pp. 13-14 *infra*, CCE agrees that the revenues derived from payments described in Section 494, tariffed "fares", "rates" and "charges", describe the revenues subject to PUCTRA. Revenues from the City Fee, however, do not fall within section 494 because (1) the City Fee is not tariffed and (2) it is not required to be tariffed because it is not subject to review by the Commission.

[18] *Monterey Peninsula Water Management District v. Public Utilities Commission* (2016), 62 Cal. 4th 693, 699.

[19] Res. M-4865, page 8.

imposed by the City ("a public agency") for the benefit of the City (so that visitors to Avalon fund the City's operation of its wharf) (2) collected by CCE from those visitors ("as a billing service for a public agency"[20]) and (3) immediately remitted by CCE to the City are nonetheless subject to the PUCTRA Fee just as if they were revenues retained by CCE derived from tariffed charges paid for services provided by CCE. A set forth below, reliance on such a conclusion is legal error.

F. Historical Background of PUCTRA Fee

Imposing the PUCTRA Fee on sums collected for the City runs counter the stated purpose of the PUCTRA provisions of Chapter 2.5 of the Public Utilities Act.[21]

Prior to the early 1980's, the Commission's regulatory activates related to transportation were funded by the Transportation Rate Fund into which regulated transportation providers paid fees. The Commission's activities regulating energy, water and telecommunications were funded out of the state's General Fund.

Because of demands on the General Fund and the perceived inequity of requiring taxpayers who were not served by Commission regulated utilities to contribute to the Commission's regulatory activities, the Legislature enacted Chapter 2.5 of the Public Utilities Code in 1982 and reorganized it in 1983.[22] The Legislature stated its intent as follows:

> (a) The Legislature finds and declares that the public interest is best served by a commission that is appropriately funded and staffed, that can thoroughly examine the issues before it, and that can take timely and well-considered action on matters before it. The Legislature further finds and declares that funding the commission by means of a reasonable fee imposed

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[20] See, *Monterey Peninsula Water Management District v. Public Utilities Commission* (2016), 62 Cal. 4th 693, 699.

> "(c)harges demanded or received by [a] public utility" … is not naturally understood to encompass charges the public utility demands or receives when acting merely as a billing service for a public agency."

[21] The Public Utilities Act is comprised of Section 201- 2119. Chapter 2.5 is comprised of Sections 401-445.

[22] Stats 1983, C. 323.

> upon each common carrier and business related thereto, each public utility that the commission regulates, and each applicant for, or holder of, a state franchise pursuant to Division 2.5 (commencing with Section 5800), helps to achieve those goals and is, therefore, in the public interest.[23]
>
> (b) The Legislature intends, in enacting this chapter, that the fees levied and collected pursuant thereto produce enough, and only enough, revenues to fund the commission with (1) its authorized expenditures for each fiscal year to **regulate** common carriers and businesses related thereto, public utilities, and applicants and holders of a state franchise to be a video service provider, less the amount to be paid from special accounts except those established by this article, reimbursements, federal funds, and the unencumbered balance from the preceding year; (2) an appropriate reserve; and (3) any adjustment appropriated by the Legislature.[24]

With the enactment of Chapter 2.5, all utilities regulated by the Commission became required to pay fees to support the Commission's regulatory activities, not just common carriers as had previously been the case. Like the fee for energy, water and telecommunications utilities, the PUCTRA fees for common carriers are to "produce enough, and only enough, revenues to fund the commission…expenditures for each fiscal year to regulate common carriers…."[25]

As we note throughout this application for rehearing, the Commission regulates the tariffed services provided by vessel carriers. It does not regulate the imposition or collection ("merely as a billing service") of government taxes and fees imposed on passengers. Imposing a PUCTRA Fee on governmental fees and taxes collected by a VCC on behalf of governmental bodies requires VCCs that collect relatively large[26] government taxes or fees to pay significantly larger PUCTRA Fees than would otherwise

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[23] Section 401(a).

[24] Section 401(b) as amended to impose fees on video franchise holders. Emphasis added.

[25] *Id*.

[26] CCE's current adult round-trip fare between San Pedro or Long Beach and Avalon is $70. The Avalon Fee imposed on each passenger disembarking at the Avalon Wharf and embarking from that Wharf to return to the mainland is $7. The current $7.00 Fee is due to increase which the additional for the tax imposed by Measure H, addressed at pp. 9-10 *infra*.

be the case. Two VCCs with identical revenues from tariffed activities regulated by the Commission would pay different PUCTRA fees depending on whether or not the VCC served points with respect to which a city or district had imposed a fees on passengers using that city or district's landing facility.

While Res. M-4865 (p. 9) , states that the amount of PUCTRA Fees collected for the vessel class will not increase because of the imposition of PUCTRA Fees on government taxes and fees, the relative shares of the members of that class will change as a result of the new policy.

II. SPECIFICATIONS OF ERROR

A. By concluding that "fees such as bridge tolls, wharfage fees, and similar charges collected from passengers is considered gross revenue derived from compensation for transportation and subject to the PUCTRA fee"[27] the Commission has failed to proceed in the manner required by law by subjecting VCC's to PUCTRA Fees on sums collected on behalf of entities other than themselves.[28]

B. By concluding that "fees such as bridge tolls, wharfage fees, and similar charges collected from passengers is considered gross revenue derived from compensation for transportation and subject to the PUCTRA fee"the Commission has failed to proceed in the manner required by law by subjecting passengers that have paid the City's Fee to an additional charge from the Commission.

C. By concluding that "fees such as bridge tolls, wharfage fees, and similar charges collected from passengers is considered gross revenue derived from compensation for transportation and subject to the PUCTRA fee" the Commission has failed to proceed in the manner required by law by allocating the budget for the vessel class amongst members of that class based on revenues that are not the revenues of those members and are

[27] Res. M-4865, page 8.

[28] Section 1757(a)(2). In *City of Marina v. Board of Trustees of California State University*, the California Supreme Court held "an agency's 'use of an erroneous legal standard constitutes a failure to proceed in a manner required by law.' *" City of Marina v. Bd. of Trustees of Cal. State Univ*. (2006) 39 Cal.4th 341, 355 (quoting *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 88).

utterly lacking in any connection to the "commission's regulatory activities"[29]

D. By asserting, without explanation "that the facts of *Monterey Peninsula Water District* are distinguishable from those here", the Commission failed to proceed in the manner required by law by not issuing findings of fact and conclusions of law on all material issues as required by Section 1705.

III. TAXES AND FEES IMPOSED BY AND PAID TO LOCAL GOVERNMENT ARE NOT "REVENUE DERIVED…FROM COMPENSATION FOR TRANSPORTATION" WITH RESPECT TO WHICH THE COMMISSION PLAYS THE SLIGHTEST ROLE

As noted at pp. 2-3 *supra*, Res. M-4865 subjects to the PUCTRA Fee a municipal fee (currently $3.50[30]) imposed by the City of Avalon ("City") "upon passengers who disembark or return to the City via harbor facilities…" The City's Fee funds the City's operation and maintenance of harbor facilities in Avalon. In its most recent City Council ordinance setting the fee, the need for it is described as follows:

> "(T)he City of Avalon ("City") funds a portion of the costs for operating and maintaining the harbor and harbor facilities through harbor fees imposed upon passengers who disembark or return to the City via harbor facilities….".[31]

The Commission plays utterly no role in how the City finances its maintenance of its harbor and harbor facilities or how its acquires the revenues to do so. No aspect of the City's endeavor falls within the scope of the "commission's regulatory activities"[32].

The same is true with respect to the City's recent initiative to fund medical facilities in Avalon. In 2020 the City Council placed Measure H, before the voters of Avalon, describing Measure H as an:

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[29] Section 422(a)(2).

[30] The fees is $3.50 for each embarkation and disembarkation. Virtually all CCE passengers purchase round trip tickers. Accordingly CCE collects $7.00 from the passenger and remits it to the City.

[31] City of Council Meeting of October 20, 2020 Agenda.

[32] Section 422(a)(2).

> "Initiative Measure Imposing a Special Tax On Passengers Travelling to The City Of Avalon and on the Mooring of Vessels Within the City of Avalon For the Purpose of Funding Costs Relating to the Improvement or Replacement of The Catalina Island Medical Center." [33]

On November 3, 2020, by a 70.62% YES vote, the voters of Avalon approved Measure: H which authorized :

> "an additional tax of $2.00 for cruise ship, ferry, or aircraft passengers and $1.00 per day per vessel renting moorings generating an estimated $1.2 million per year to fund the Catalina Island Medical Center."[34].

(The charges set forth in the original ordinance imposing wharfage fees on disembarking passengers and the ferry passenger tax approved by Measure H are referred to herein as the "City Tax".)

Again, because the City has no practical way of collecting its per-passenger City Tax from each arriving or departing passenger, CCE and other carriers collect the City Tax and remits the sums collected directly to the City (a practice acknowledged by the Commission over forty years ago when it authorized the removal of the City Wharfage Fee from vessel carrier tariffs.)[35] The City Taxes are not included in CCE's Annual Reports to the Commission because the fees are not derived from transportation services provided by CCE; they are not "Passenger Revenue" reported on Line 13 of Schedule B-1 of CCE's Annual Report. Moreover, the revenue from the City Tax is the City's, not CCE's. The revenue from the City Tax does not fund CCE's cost of operation. The revenue funds the City's operation and maintenance of the City's harborside facilities and the City's development and operation of medical facilities in Avalon. CCE is simply the

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[33] Measure H ballot summary.

[34] https://ballotpedia.org/Avalon,_California,_Measure_H,_Traveler_and_Boat_Mooring_Tax_for_Hospital_Funding_Initiative_(November_2020)

[35] *H. Tourist, Inc.*4 CPUC 2d 424, 1980 WL 129080 (Cal.P.U.C.)

"billing service " to which a unanimous California Supreme Court referred in *Monterey.*[36] There is simply no role for the Commission in the City's collection of taxes to support these municipal endeavors.

IV. WHETHER CHARACTERIZED AS "FARES", "RATES" OR "CHARGES", "TRANSPORTATION REVENUES" ARE REVENUES DERIVED FROM SCHEDULES APPROVED BY THE COMMISSION.

A. Contrary to Section 1705, Res. M-4865 Does Not Explain Why "the facts of *Monterey Peninsula Water District* are distinguishable from those here."

Obviously, the Commission has no jurisdiction over the City Tax. The Commission may not set the tax, review its level or dictate the City's means of collection even if is collected by a regulated utility (CCE) and then remitted to the government body (the City) imposing the tax.[37] Res. M-4865 does not directly contend otherwise. Instead, it states that "that that the facts of *Monterey Peninsula Water District* [38] [the principal authority with respect to the jurisdictional limitation] are distinguishable from those here…"[39]

Unfortunately, and in contravention of Section 1705, Res. M-4865 does not identify the facts the Commission deems relevant to its conclusion that *Monterey* is inapposite, It is required to do so.

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[36] See, *Monterey Peninsula Water Management District v. Public Utilities Commission* (2016), 62 Cal. 4th 693, 699.

> "(c)harges demanded or received by [a] public utility" … is not naturally understood to encompass charges the public utility demands or receives when acting merely as a billing service for a public agency."

[37] *Monterey Peninsula Water Management District v. Public Utilities Commission* (2016), 62 Cal. 4th 693

[38] *Id.*

[39] Res. M-4865, page 10.

Section 1705 requires that the Commission provide "separately stated findings of fact and conclusions of law by the [C]ommission on all issues material to the order[40] or decision."[41] The separately stated findings of fact and conclusions of law must:

> afford a rational basis for judicial review and assist the reviewing court to ascertain the principles relied upon by the [C]omission and to determine whether it acted arbitrarily, as well as assist parties to know why the case was lost and to prepare for rehearing or review, assist others planning activities involving similar questions, and serve to help the [C]ommission avoid careless or arbitrary action.[42]

"Every issue that must be resolved to reach that ultimate finding is 'material to the order or decision' and findings are required on the basic facts upon which the ultimate finding is based."[43] Although the Commission may have discretion to determine which facts are relevant to a particular decision, the Commission must state those facts and make findings on the material issues that ensue from those facts.[44] Applying Section 1705, the California Supreme Court has annulled Commission decisions which fail to make findings on every issue necessary to reach the ultimate finding.[45]

Because Res. M-4865 contains no findings or conclusions, CCE is unable to discern the basis for the Commission's rejection of *Monterey* as relevant authority. The Commission may have reached that conclusion because Res. M-4865 does not directly interfere with the City's collection of its tax. As set forth below, however, *Monterey* also informs the proper construction of Section 424(b), one that requires that "gross revenues"

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[40] Res. M-4865 is an "order.

[41] Cal. Pub. Util. Code §1705.

[42] *Greyhound Lines, Inc. v. Pub. Utils Comm'n*, (1967) 65 Cal. 2d 811, 813, (hereafter *"Greyhound Lines"*); *see also, Cal. Motor Transp. Co. v. Pub. Utils Comm'n*, (1963) 59 Cal. 2d 270, 274-275 (hereafter "*Cal Motor Transport"*); *Cal. Mfrs. Ass'n v. Pub. Utils Comm'n*, (1979) 24 Cal. 3d 251, 258-259.

[43] *Greyhound Lines*, 65 Cal. 2d at 813; *Cal. Motor Transport*, 59 Cal. 2d at 274-75 (emphasis supplied); *City of Los Angeles*, 7 Cal. 3d at 337.

[44] *Cal Motor Transport*, 59 Cal.2d at 275; *City of Los Angeles*, 7 Cal.3d at 337.

[45] *Greyhound Lines*, 65 Cal.2d at 813 (ultimate finding regarding "public interest"); *Cal. Motor Transport*, 59 Cal.2d at 274-75 (ultimate finding regarding "public convenience and necessity").

subject to the PUCTRA Fee, be limited to "revenues" derived from "the applicable rates, fares, and charges specified in its schedules filed and in effect at the time".[46] *Monterey* recognizes that sums collected "when acting merely as a billing service for a public agency" are not "(c)harges demanded or received by [a] public utility".[47] Res. M-4865 does not explain why the application of *Monterey* does not preclude the extension of PUCTRA to the collections at issue here.

B. Section 424(b) must be construed in a manner consistent with (1) Section 494(a) and (2) jurisdictional limitations on the Commission's authority to require the filing of a tariff.

1. Pursuant to Section 494(a), "all compensation for the transportation ….of persons" (Section 424(b)) must be derived from tariffed charges.

It is a well-accepted rule of statutory construction that a statutory provision should not be interpreted in a way that is inconsistent with the statutory scheme.[48] The construction of the term "all compensation for the transportation or storage of property or the transportation of persons" (Section 424(b)) that is most consistent with the other provisions of the Code is that the compensation so described is comprised of revenues derived, as required by Section 494(a), from "the applicable rates, fares, and charges specified in its schedules filed and in effect at the time…", [49] tariffed rates approved by the Commission. Section 494(a) links the term "compensation for the transportation of persons or property" to revenues derived from Commission approved tariffs. Since the

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[46] See, discussion at IV.B.2 (pp. 14-15), *infra*.

[47] *Monterey Peninsula Water Management District v. Public Utilities Commission* (2016), 62 Cal. 4th 693, 699.

[48] *In re Isaiah W.* (2016) 373 P.3d 855 ("In construing statutes, court considers the context of the statute as a whole and the overall statutory scheme")

[49] Section 494(a) provides that:

> "No common carrier shall charge, demand, collect, or receive a different compensation for the transportation of persons or property, or for any service in connection therewith, than the applicable rates, fares, and charges specified in its schedules filed and in effect at the time…"

Legislature has not authorized the Commission to detariff common carrier vessel fares, the City's Tax cannot constitute "gross intrastate revenue" because it is not tariffed.

2. Carriers like CCE do not file tariffs for the collection of fees and taxes on behalf of government bodies because to do so would subject the activity to Commission authority.

For at least forty years, vessel carrier tariffs have been devoid of provisions describing the collection of the Avalon Wharfage Fee. ***Far more important than the fact that the City Tax is not tariffed is why it is not tariffed.*** The reason the City Tax is not tariffed, nor could it be, is because the Commission lacks the authority to review the City's fees under Sections 451 or 454. *Monterey Peninsula Water Management District v. Public Utilities Commission*, *supra* 62 Cal. 4th at 699-700.[50] Under Section 494(a), that review is predicate to a carrier's lawful receipt of "compensation for the transportation of persons or property…". No such review does or may occur with respect to a government charge such as the City Tax.

Equally important is the Court's basis for holding that the User Fee at issue in *Monterey* was exempt from Commission review. The Court concluded that while the fee was collected from water users by a regulated water utility, it was not a "charge demanded or received by [a] public utility" where it was simply collected for a government body.[51]

Only revenues from "transportation or storage of property or the transportation of persons" that are actually collected for the benefit of the VCC itself, subject to

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[50] See the Courts' rejection of "Section 451 Review" in *Monterey Peninsula Water Management District v. Public Utilities Commission*, *supra* 62 Cal. 4th at 699-700

[51] See, *Monterey Peninsula Water Management District v. Public Utilities Commission* (2016), 62 Cal. 4th 693, 699.

> "(c)harges demanded or received by [a] public utility" … is not naturally understood to encompass charges the public utility demands or receives when acting merely as a billing service for a public agency."

regulation[52] pursuant to Sections 451[53] and 454, are subject to PUCTRA. Revenues from taxes and fees imposed by a government body which are simply collected "merely as a billing service" for that government body are not revenues from "transportation or storage of property or the transportation of persons".

V. EXTENDING THE REACH OF PUCTRA TO ALL RECEIPTS OF A VCC LEADS TO ABSURD RESULTS

Based on the text of Sections 208 and 424(b), Draft Res. M-4865 contends that, "'compensation for transportation' includes not only 'fares' approved in carrier tariffs, but also other "charges incidental to the delivery of transported persons."[54]. The construction of Sections 208 and 424(b), however, fails when practically applied.

The proper construction of a statute must embrace a reasonable and common sense interpretation that avoids absurdity.[55] Yet, as we show below, absurdity results from extending PUCTRA to revenue from activities not subject to the Commission's jurisdiction.

Many vessel companies derive revenues arguably described in Section 208 and 424(b) but from services that lie completely outside the Commission's jurisdiction. The most notable examples are fares for sightseeing tours or excursions exempt from

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[52] As we note below, the purpose of the PUCTRA fee is recover the cost of "the commission's regulatory activities for the class from which the fee is collected…." Section 422(a)(2).

[53] Section 451may not be applied to the collection of the City's Tax by CCE. *Monterey Peninsula Water Management District v. Public Utilities Commission*, *supra* 62 Cal. 4th at 699-700.

[54] Res. M-4865, at page 10.

[55] *Westerfield v. Superior Court* (2002) Cal.App.4th 994; *Oldham v. Kizer* (1991) 235 Cal.App.3d 1046 ("Statutes must be given a reasonable interpretation, and a literal interpretation which will lead to an absurd result will be avoided if possible"); *Robertson v. Willis* (1978) 77 Cal.App.3d 358 ("When courts are called upon to determine meaning of a statute, statute must be given a fair and reasonable interpretation with due regard to language used and purpose sought to be accomplished").

Commission regulation ("A to A service").[56] The Commission does not incur any costs regulating sightseeing tours that would be properly be included in "the authorized commission budget…to regulate common carriers…"[57] or, more specifically, "regulatory activities for the carrier class from which the fee is collected…".[58] The charges for those services are not regulated by the Commission. Yet, under the construction of Section 424(b) adopted in Res. M-4865[59] , if such a company obtained a VCC to provide a *di minimus* level of regulated service, all of its "transportation revenue" including that from unregulated sightseeing tours should be included in any PUCTRA report the VCC filed under Chapter 2.5. That outcome, one compelled by the construction of Section 424(b) adopted in Res M-4865, is wholly inconsistent with Section 1007, as construed in *Golden Gate*[60], and Section 421(b).[61] The Commission would be recovering revenue to fund the cost of regulating activities which it has no authority to regulate.

Consider, for example, the case of a carrier previously uncertified because all of its revenues were derived from activity exempt from Commission regulation under *Golden Gate*[62]; that carrier pays no PUCTRA fee. Assume that carrier then obtains a VCC permitting it to serve a single regulated scheduled route adding 5% to its overall revenues. Under Res M-4865, certification would increase the percentage of the newly certified carrier's overall revenues subject to PUCTRA from 0% to 100% even though only 5% of those overall revenues were derived from activities subject to regulation by the Commission. That is because, under Res. M-4865, 100% of the carrier's revenue is

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[56] *Golden Gate Scenic Steamship Lines, Inc v. Public Utilities Commission,* 57 Cal. 2d 373 (1962) ("*Golden Gate*").

[57] Section 421(b). See also, Res M-4865, page 2.

[58] Res. M-4865, page 2.

[59] Res. M-4865, page 8.

[60] See footnote 6, *supra*.

[61] "The annual fee shall be established to produce a total amount equal to the amount established…..to regulate common carriers and related businesses…..". "Related Businesses" are governed by Sections 3901-5513.

[62] See footnote 6, *supra*.

subject to PUCTRA even though only 5% of the revenue is derived from activities the Commission has the authority to regulate.

This outcome, grounded in Res. M-4865's construction of Section 424(b), makes utterly no sense.

VI. EXTENDING PUCTRA TO TAXES COLLECTED TO FUND THE MAINTENANCE OF THE CITY'S WHARF AND CONSTRUCTION OF A HOSPITAL IS COMPLETELY AT ODDS WITH THE LEGISLATIVE SCHEME FOR CALCULATION OF THE FEES

Subjecting the City Tax to PUCTRA Fees is inconsistent with the purpose of the statute which is to derive funds necessary to "regulate common carriers."[63] The statutory scheme is simple. It apportions the cost of regulating each class of common carrier (derived from the Governor's Budget)[64] to the carriers in that class in proportion to each individual carrier's percentage of the revenues[65] for that class derived from "the transportation or storage of property or the transportation of persons".[66] The City's per-passenger Fee has no bearing on the Commission's cost to "regulate common carriers."[67] The Commission's cost of regulating any class of public utility is not affected by that utility's collection of a fee imposed by a government body and paying it to that government body. By assessing the fee on revenues not employed to develop the fee level in the first instance, the Commission would collect in excess of the required cost recovery under the statute. Even if the Commission does not increase the budget figure, it will increase the percentage of that figure paid by VCC's that collect significant taxes and fees for government bodies from what it would be if PUCTRA Fees were not included.

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[63] Section 421(b).

[64] See Draft Res. M-4858, at page 4.

[65] Section 422 (c)(1).

[66] Section 424(b)

[67] Section 421(b).

VII. EXTENDING PUCTRA TO TAXES COLLECTED TO FUND THE MAINTENANCE OF THE CITY'S WHARF AND CONSTRUCTION OF A HOSPITAL MAY REQUIRE AN INCREASE IN FARES TO PASSENGERS

Extending PUCTRA to taxes collected to fund the maintenance of the City's Wharf and construction of a hospital will require CCE to increase the amount collected from passengers for remittance to the City by .55%. The alternative is to absorb the fee itself. This was the choice the Commission thought it eliminated forty years ago.

> In order not to have to apply to have its tariff amended every time the City of Avalon changes its landing fee or, alternatively, to have to absorb the changes in its revenue, H. Tourist proposes to separate the fee from the fare listed in its tariff and to collect it exclusively of its tariff listing.[68]

Utilities that collect fees pursuant to Chapter 2.5, PUCTRA, "may identify separately, on the bill of each customer or subscriber, the amount to be paid by each customer or subscriber for purposes of funding the commission pursuant to this chapter [Chapter 2.5].[69] A vessel passenger could be required to pay the amount of the increase even though "the fees levied and collected pursuant thereto [are to] produce enough, and only enough, revenues to fund the commission with…its authorized expenditures for each fiscal year to regulate common carriers…."[70] Again, however, the Commission plays no role in setting the City Tax, reviewing its level or dictating the City's means of collecting the tax, even where it is collected by a regulated utility (CCE) and then remitted to the City.[71] It is hard to discern what the passenger (or the VCC) derive from the payment.

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[68] *H. Tourist, Inc.*4 CPUC 2d 424, 1980 WL 129080 *1

[69] Section 404(c).

[70] Section 401(b).

[71] *Monterey Peninsula Water Management District v. Public Utilities Commission* (2016), 62 Cal. 4th 693

VIII. CONCLUSION

Over forty years ago the Commission authorized the exclusion of the City's wharfage fee from vessel carrier tariffs.[72] Chapter 2.5 has existed for most if not all of that forty years. To the best of CCE's knowledge, until recently, none of the passenger carriers to Avalon have ever been asked to include the City Tax in gross revenues as though it was derived from regulated tariffed service and retained by the carrier. The Commission has never ordered such an outcome and Chapter 2.5 does not permit it to do so now. By doing so, the Commission would assert that it may impose the PUCTRA Fee on revenues that do not belong to the carrier and on vessel activities completely outside the scope of the Commission's jurisdiction. Such an assertion is devoid of statutory support.

Res. M-4865 should be reheard and modified to confirm that the PUCTRA Fee only applies to common carrier revenues charged and retained by the carrier pursuant to tariffs as provided in Section 494(a).

IX. REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 16.3, CCE requests oral argument with respect the this application for rehearing. Rule 16.3(a) provides:

> (a) If the applicant for rehearing seeks oral argument, it should request it in the application for rehearing. The request for oral argument should explain how oral argument will materially assist the Commission in resolving the application, and demonstrate that the application raises issues of major significance for the Commission because the challenged order or decision:
>
> (1) adopts new Commission precedent or departs from existing Commission precedent without adequate explanation;
>
> (2) changes or refines existing Commission precedent;
>
> (3) presents legal issues of exceptional controversy, complexity, or public importance; and/or

[72] *H. Tourist, Inc.*4 CPUC 2d 424, 1980 WL 129080 (Cal.P.U.C.)

(4) raises questions of first impression that are likely to have significant precedential impact

Res. M-4865 and this application for rehearing of it satisfy the requirements of Rule 16.3(a). No PUCTRA resolution has ever extended PUCTRA to government taxes and fees collected for the government body that imposed them. The lawfulness of doing so is question of first impression.

Moreover, the "clarification" embraced in Res. M-4865 will extend statewide not only to government fees but to other revenues not derived from activities subject to the Commission's jurisdiction.[73] No Rulemaking or other formal proceeding was conducted in advance of the "clarification" in Res. M-4865 nor were any briefs filed. Under these circumstances oral argument is appropriate.

For all the foregoing reasons, the Resolution should be reheard and modified.

Respectfully submitted January 5, 2023, at San Francisco, California.

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[73] See, V *supra* regarding sightseeing vessels that begin serving a single regulated route.